

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	WC Docket No. 07-245
)	
Implementation of Section 224 of the Act;)	RM-11293
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments)	RM-11303
)	

COMMENTS OF
THE ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION
THE BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA
THE BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON
THE CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND,
DELAWARE & D.C.
THE CABLE TELEVISION ASSOCIATION OF GEORGIA
THE CABLE TELECOMMUNICATIONS ASSOCIATION OF NEW YORK, INC.
THE MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION
THE NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC.
THE OREGON CABLE TELECOMMUNICATIONS ASSOCIATION
THE SOUTH CAROLINA CABLE TELEVISION ASSOCIATION
THE TEXAS CABLE ASSOCIATION

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The Alabama Cable Telecommunications Association, the Broadband Cable Association of Pennsylvania, the Broadband Communications Association of Washington, the Cable Television Association of Georgia, the Cable Telecommunications Association of New York, Inc., the Cable Telecommunications Association of Maryland, Delaware & the District of Columbia, the Missouri Cable Telecommunications Association, the New England Cable and Telecommunications Association, Inc., the Oregon Cable Telecommunications Association, the South Carolina Cable Television Association, and the Texas Cable Association (the "State Cable Associations") hereby submit comments in response to the Notice of Proposed Rulemaking

(“NPRM”) opposing amendments to the Commissions’ rules and policies governing pole attachments under Section 224 of the Communications Act (“Act”), 47 U.S.C. § 224.¹

I. INTRODUCTION AND SUMMARY

The State Cable Associations are the principal state trade associations representing cable television operators in the United States. The associations’ members include cable operators serving more than 90% of the cable television subscribers in Alabama, Delaware, District of Columbia, Georgia, Maryland, Missouri, New York, Pennsylvania, New England (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont), Oregon, South Carolina, Texas, and Washington, or approximately 25.5 million television households. The State Cable Associations’ members operate both in states that have certified to regulate pole attachments, and those that have not, and thus are subject in some instances to pole rates set by state public service commissions and in others to this Commission’s pole attachments regulations.

The proposal set forth in the NPRM to adjust the this Commission’s pole attachment formula above the current cable rate threatens to significantly increase the cost of providing cable and broadband services and hurt their ability to remain competitive in video, voice and broadband services. Because the certified states have uniformly rejected increased pole attachment rates for broadband and even telecommunications services, the associations advocate here against any adjustment to the existing cable pole attachment formula.

There simply is no valid economic or policy reason for changing the existing pole attachment regulatory regime which has served to greatly promote broadband deployment. Attachers and regulators – in FCC and certified states –all have accepted the judicially sanctioned existing cable pole attachment formula. If changes are to be made, the State Cable Associations

¹ FCC 07-187 (rel. Nov. 20, 2007), 73 Fed. Reg. 6879 (Feb. 6, 2008), corrected, 73 Fed. Reg. 8028 (Feb. 12, 2008).

respectfully suggest lowering all applicable pole attachment rates to the cable rate. The Commission must resist utility efforts to open long-settled pole rental issues to reconsideration, effectively putting the pole attachment formulas and all their underlying presumptions into play when no economic or empirical bases exist for doing so.

Section 224 of the Communications Act grants cable operators and telecommunications carriers the right to attach their facilities to utility poles and pay just and reasonable rates for their attachments, provisions deemed necessary because poles are essential facilities. Moreover, communications carriers generally are prohibited by state and local laws and regulations from building their own pole infrastructure where poles have already been placed. As economists and federal, state, and local governments have long recognized, sharing these essential facilities at just and reasonable rates is economically efficient, pro-competitive and necessary to prevent monopoly pricing.

In the course of deploying or modifying their facilities, when cable operators request access to a pole that has no immediately available space for new attachments, existing facilities on the pole are rearranged or the pole is replaced, a process known as “make-ready.” Such acts of making capacity available include replacing poles with taller or stronger ones able to carry more facilities, rearranging existing wires and other equipment on a pole to make space available, or taking other reasonable make-ready steps to accommodate attachers wherever it is reasonable and technically possible to do so in a safe manner.

In such situations, the cable operator or telecommunications carrier requesting or needing access typically will pay the utility to make space available by covering 100% of the costs of a new, taller pole and paying for the new pole’s installation, or by paying 100% of the costs of rearranging existing facilities on the pole to make existing space available consistent with pole

engineering and safety requirements. This procedure allows cable operators to attach their facilities with no out-of-pocket cost to the utilities and with a net benefit to the utilities, because the utilities assume title to the new pole (whose cost and installation was paid for entirely by the attacher) which improves the existing infrastructure. In addition to receiving the benefit of the improved infrastructure, the utility may also charge a rental to the attacher for which make-ready was performed, existing third party attachers and any new attachers (who may now occupy any additional space on the new pre-paid pole).

The rental paid by cable operators, when considered along with make-ready reimbursements, are more than adequate to compensate pole owning utilities. These payments reimburse the utilities for *all* the costs incurred for hosting third-party attachments, *plus* a proportionate share of the costs of all poles (even those purchased by the operator through make-ready), *plus* a share of all pole-related administrative and maintenance expenses, *plus* depreciation, taxes, *and even* a reasonable profit based on the default FCC rate of return (11.25%) or the applicable state regulatory commission rate of return. The proposal outlined in the captioned NPRM, however, seeks to raise cable attachers' rental rates without any new costs incurred by the utility or anything new or different provided in return by the pole owners. Thus, the entire impact of increasing pole rates would simply move hundreds of millions of dollars each year from cable operators and their subscribers to the pole-owning electric utilities, which will essentially reward them with the equivalent of monopoly profits and penalize subscribers who will be deprived of the substantial benefits of competitively priced services.

Although the Commission wants "to ensure that [its] regulatory framework remains current and faithful to the pro-competitive market-opening provisions of the [1996] Act," raising pole rents would instead dim the "light of [its] experience over the last decade," and ignore

“advances in technology, and developments” in the video and telecom markets.² Raising pole rents will not “facilitate pole and conduit access.”³ Instead it will deter broadband investment and either reduce the availability of broadband services, or render it more expensive.

Congress has directed the Commission to promote innovation and investment by multiple market participants in order to stimulate competition for all services, including broadband communications services. Section 230(b) requires the Commission to implement congressional policy of promoting the continued development of the Internet and related technologies. The proposal in the NPRM runs counter to Congress’ objectives. Indeed, the Supreme Court recognized that raising pole rents for Internet services would subject innovative cable operators to “monopoly pricing ... [and] defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and, if necessary, ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.’”⁴ If pole attachment rates are increased, documented consumer savings from competition in broadband services will be diverted into the pockets of the electric utilities, thereby functioning as a reversal of Congressional intent to promote new broadband deployment and local voice competition. Raising rents will instead impose a new and massive “broadband tax” on Internet services provided by cable operators.

The Commission should leave its cable pole rental formula and precedent intact and forebear from imposing higher pole rental on any new broadband, information or telecommunications service, provided as a stand-alone or commingled service.

² NPRM at ¶ 1.

³ *Id.* at ¶ 2.

⁴ *NCTA v. Gulf Power*, 534 U.S. 327, 339 (2002) (“*Gulf Power*”).

II. THERE IS NO VALID ECONOMIC, POLICY OR STATUTORY RATIONALE FOR RAISING POLE ATTACHMENT RATES FOR BROADBAND SERVICES

A. Precedent Underlying Existing Pole Attachment Regulation and Pricing Shows that Cable Pole Rental and Make-Ready Reimbursements Paid by Pole Owning Utilities Provides Them Significantly More Than “Just Compensation” for Hosting Third Party Attachments

The Commission seeks comment on how pole attachment “price and usage” affects the “larger goals of the Act,” the “expansion of Broadband Internet access service,” and “competition to deliver services.”⁵ Any increase in the pole attachment rental rates for cable operators that provide cable video and broadband (cable modem) service over their cable television system pole attachments would be contrary to existing Commission and judicial precedent under Section 224, frustrate the “larger goals of the Act,” curtail “broadband Internet access service” as well as other new and nascent services, and negatively impact “competition in the delivery of services.” For these and other pro-competitive reasons, the states that have certified to regulate pole attachments have uniformly rejected similar proposed increases.

The effort by cable operators to rebuild their infrastructure, provide new and competitive services, and bring broadband access to every community in which their lines pass, has maximized choices for subscribers.⁶ Moreover, the history of pole regulation and pricing, including decisions by the courts, state regulatory agencies, and the Commission itself, all clearly demonstrate that the rates paid by cable operators for pole attachments carrying cable and information services are not only “just and reasonable” as required by Section 224, but consistent

⁵ NPRM at ¶ 13.

⁶ NPRM at ¶ 14 (“Over the last few years, the Commission has recognized that the once-clear distinction between ‘cable television systems’ and ‘telecommunications carriers’ has blurred as each type of company enters markets for the delivery of services historically associated with the other.”). *See* “‘Perfect storm’ raining gains on cable industry,” *Chicago Tribune*, at C9, Jan. 7, 2007 (“[C]able’s success with its ‘triple play’ package of Internet, TV and phone service all worked to push cable stocks up...”).

with congressional purpose and the Constitution and encourage the deployment of broadband Internet capability.

1. Pole Attachment Legislation and Regulation, 1978-1996

In 1978, in response to evidence that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachments Act of 1978, 47 U.S.C. § 224 (the “Act” or “Section 224”).⁷ In the deliberations preceding the Act, Congress observed that “[i]n many communities,” “because of the lack of available rights-of-way, environmental restrictions, or zoning laws,” cable operators were “unable to construct [their] own pole plant for the attachment of [their] coaxial cable” and instead were required “to use existing utility company poles.”⁸ Congress further found that “public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates.”⁹ As succinctly summarized by the Supreme Court, “utilities ... ha[d] found it convenient to charge monopoly rents.”¹⁰ Thus, the 1978 Act was passed “[t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unreasonable pole attachment practices on the wider development of cable television service to the public.”¹¹

Under the regulations adopted by the Commission pursuant to Section 224’s express directive, utilities recover all of their out-of-pocket, or incremental costs, in the form of make-

⁷ *FCC v. Florida Power Corp.*, 480 U.S. 245, 257 (1987) (“*Florida Power*”).

⁸ H.R. REP. NO. 94-1630, at 5 (1976).

⁹ S. REP. NO. 95-580, at 13 (1977).

¹⁰ *Gulf Power*, 534 U.S. at 330. *See also Florida Power*, 480 U.S. at 247 (utilities were said to be “exploiting their monopoly position by engaging in widespread overcharging.”).

¹¹ S. REP. NO. 95-580, at 114. In the NPRM, the Commission diminishes Congressional purpose and the Supreme Court’s analysis by characterizing the Act’s passage as simply a congressional “react[ion] to an apparent need” to resolve conflicts between cable operators and utilities. NPRM at ¶ 4, n. 4.

ready payments directly from cable systems.¹² Utilities also receive compensation for pole attachments through annual pole rental rates. Section 224 creates a range of compensation, the low end of which is the incremental costs of the utility that would not have been incurred but for the new attachment, and the high end of which is an allocation of the fully-loaded carrying costs of the pole (including return on investment). The FCC has long interpreted the statute to provide that when it is reducing a utility's annual rate for pole attachments in that range, it reduces it only to the statutory maximum.¹³

The FCC allocates annual pole costs to cable operators through a set of presumptions and references to existing electric utility financial reports filed with the Federal Energy Regulatory Commission ("FERC").¹⁴ The FCC's formula for cable attachments begins with the annual carrying costs for the *entire* pole—maintenance, depreciation, administrative overhead, taxes, and return on investment at the rate authorized by the applicable State Public Service Commission ("PSC"). Each cost input is taken directly from each utility's specific, publicly-reported cost information (FERC Form 1 or ARMIS Reports). Although the FCC publishes a schedule of the FERC accounts that are presumptively included in the cost calculation, the FCC actually tailors the cost calculation to individual showings by utilities.¹⁵ These costs for the whole pole are then allocated by the amount of space used by cable operators. The formula uses presumptions, for a population of 35- and 40-foot poles, that 13.5 feet of space above minimum

¹² *In re Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 7 (2000) ("2000 Pole Order"); *In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, ¶ 4 (1987) ("1987 Pole Order"), *on recon.*, 4 FCC Rcd 468 (1989).

¹³ *Florida Power*, 480 U.S. at 254.

¹⁴ The information used to calculate rates for poles owned by incumbent local exchange carriers is found in the Automated Reporting Management Information System ("ARMIS") Reports filed with the Commission.

¹⁵ *1987 Pole Order*, 2 FCC Rcd at 4404.

grade clearance is “usable” and cable attachments “use” one foot of that space.¹⁶ Thus, a cable attachment is assigned $\frac{1}{13.5}$ (7.4%) of the annual carrying costs of the entire pole. This presumption is explicitly rebuttable.¹⁷ Utilities can and do submit their actual plant records so that a utility with shorter poles (and therefore less usable space) can assign proportionately more cost to each foot of usable space. To the benefit of the pole owner, a cable or telecommunications attachment is presumed to occupy one foot of pole space for formula purposes although the attachment is actually much smaller and may only occupy one inch in diameter.¹⁸

The FCC developed this approach through a series of rulemakings and adjudicated cases that were upheld on appeal.¹⁹ In 2001 the FCC conducted a rulemaking that led to it to reaffirm the propriety of the annual cable attachment rental methodology, including the use of particular cost accounts and the applicability of established presumptions.²⁰ Congress has repeatedly reaffirmed the FCC formula with its treatment of usable space presumptions in 1982,²¹ 1984,²² 1992,²³ and 1996.²⁴

¹⁶ 47 C.F.R. § 1.1418.

¹⁷ 47 C.F.R. § 1.1404(g)(1)(xi).

¹⁸ *Second Report and Order*, 77 FCC 2d at 69-70 (regarding cable attachments); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, ¶ 1 (1998) (regarding telecommunications attachments); *2000 Pole Order*, *supra* note 12 at ¶ 22.

¹⁹ *See, e.g., Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981); *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Notice of Proposed Rulemaking, 68 F.C.C.2d 3 (1978) (“1978 Notice of Proposed Rulemaking”); First Report and Order, 68 F.C.C.2d 1585 (1978) (“First Report”); Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59 (1979) (“Second Report”); Memorandum Opinion and Order, 77 F.C.C.2d 187 (1980) (“Reconsideration”); *Petition to Adopt Rules Concerning Usable Space on Utility Poles*, Memorandum Opinion and Order, 56 R.R.2d 707 (F.C.C. 1984).

²⁰ *1987 Pole Order*, *2000 Pole Order*; *see also In re Amendment of Rules and Policies Governing Pole Attachments*, Consolidated Partial Order On Reconsideration, 16 FCC Rcd 12103 (2001). The underlying record regarding usable space has been updated regularly and twice since passage of the 1996 Act in CS Docket 97-98 and CS Docket 97-151. The FCC most recently affirmed its approach regarding usable space in its May 25, 2001 Order. *In Re Amendment of Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶¶ 48, 51 (2001).

²¹ Communications Amendment Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982).

Regulatory intervention to set rents at cost-based rates (with profit) was required because poles are “essential facilities” and cable operators generally are prohibited from building their own pole infrastructure where poles have already been placed.²⁵ Without regulatory intervention, the pole owning utilities were in a position to “extract[] monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates.”²⁶ Before the 1978 Act the ILECs tried to protect themselves from cable competition by steering cable operators into leasing telephone lines under restrictive tariffs and by raising pole rents to drain cable resources.²⁷ Later, the electricians tried to handicap the deployment of fiber for data services²⁸ and have since

²² Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

²³ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

²⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

²⁵ See, e.g., *United States v. AT&T*, No. 74-1698, Plaintiffs’ First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department’s cataloging of BOC dominance of pole and conduit facilities. “The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative”). *United States v. Western Elec.*, 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies “do depend on permission from the Regional Companies for attachment of their cables to the telephone companies’ poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . .”), *aff’d in part, rev’d in part*, 900 F.2d 283 (D.C. 1990); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is “generally unfeasible”); *Better TV, Inc. of Dutchess Co. NY*, 31 F.C.C.2d 939, 956 (1971), *recon. denied*, 34 F.C.C.2d 142 (1972) (“we know from experience that, as a practical matter, a CATV operator desiring to construct his own system must have access to those poles.”).

²⁶ S. REP. NO. 95-580, at 13 (1977); *Gulf Power*, 534 U.S. at 330 (utilities have found it “convenient to charge monopoly rents”); see also *Florida Power*, 480 U.S. at 247 (utilities were said to be “exploiting their monopoly position by engaging in widespread overcharging.”).

²⁷ *Section 214 Certificates*, 21 F.C.C.2d 307, 323-29 (1970) (Cable systems “have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities.”); *General Tel. Co. of California*, 13 F.C.C.2d 448, 463 (1968) (by control over poles, telco is in a position to preclude an unaffiliated CATV system from commencing service). Protracted and expensive antitrust litigation was also recognized as an insufficient remedy to utility pole abuse. See *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (9th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) 63,944 (D.S.D. 1981)(cable operator eventually prevailed in antitrust litigation, but by that time, 12 years later, it was bankrupt).

²⁸ Because CATV no longer operated as solely a community antenna service, the FCC “adopted the ‘more inclusive term cable television systems.’” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 n.7 (1984). That change in nomenclature reflected the FCC’s recognition that “cable’s multichannel or broadband capacity” could provide a broad array of services to its subscribers. In *Heritage*, the Commission interpreted Section 224 to apply to operators installing fiber to provide cable and data services and could continue to pay the same cable rate for pole attachments. *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 7099, ¶ 12 (rel. Nov. 21, 1991) (“We believe that in light of the fact that Section 224 includes no language limiting

continued their assault on the FCC's cost based rates, and terms and conditions governing cable operator and telecommunications attachments.²⁹

2. The 1996 Act, Access, and the New Telecommunications Rate

In the Telecommunications Act of 1996 ("1996 Act"),³⁰ Congress sought to promote competition while simultaneously guarding against utilities' abuse of their monopoly control over poles. Congress expanded the 1978 Act to include *all* competitive cable and telecommunications carriers and granted them a right of pole access upon payment of just and reasonable compensation.³¹ In the 1996 Act, Congress also amended federal law to allow interstate electric utilities to provide communications services under rules ensuring fair

the nature of the services of a cable operator to which it applies, Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles.") (*"Heritage"*), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). *Heritage* is valid authority for interpreting the federal Act. *Gulf Power*, 534 U.S. at 336.

²⁹ See, e.g., *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd 24615 (rel. Nov. 20, 2003) (holding, *inter alia*, that the utility's implementation of certain terms and conditions subjected the attacher to excessive, unjust and unreasonable costs and charges for access to poles); *Cavalier Telephone, LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd 9563 (2000) (finding that utility unreasonably denied access and discriminated against CLEC attacher), *vacated by settlement*, 2002 FCC LEXIS 6385 (2002)(in issuing the *vacatur*, the FCC specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusion contained in" the underlying decision). See also *Fiber Technologies Networks, L.L.C. v. Duquesne Light Co.*, File No. EB-03-MD-005 (complaint filed Apr. 8, 2003) (challenging, *inter alia*, electric utility's requirement that CLEC pay for comprehensive pole inventory and analysis and assessment of make-ready costs on last attacher for previous attachment violations); *Adelphia Business Solutions of Pennsylvania, Inc. v. Duquesne Light Co.*, File No. PA 01-004 (complaint filed Sept. 17, 2001) (protesting electric utility's denial of access through delays, discrimination, and pressure to lease fiber from utility's own communications affiliate) (proceeding terminated); *Charter Communications, Inc. v. Union Electric d/b/a AmerenUE*, File No. PA 01-001 (complaint filed Jan. 11, 2001) (challenging utility's unreasonable and unlawful fees assessed for deployment of overlashed fiber-optic facilities, including unreasonable plant inventory requirements) (proceeding terminated); *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 15 FCC Rcd 11450 (2000) (denying utility's \$250.00 per pole unauthorized attachment fee, pole survey fees and application of penalties to drop poles as unjust and unreasonable), *aff'd* 17 FCC Rcd 6268, *aff'd sub nom. Public Service Co. of Colorado v. FCC*, 328 F.3d 675 (2003); *Texas Cable and Telecommunications Ass'n v. Entergy Services*, 14 FCC Rcd 9138 (1999) (rejecting utility attempt to recover engineering survey fee as unjust and unreasonable where not based on actual costs of engineering for attachments); *Texas Cable & Telecomm's Ass'n v. GTE Southwest, Inc.*, 14 FCC Rcd 2975 (1999) (same); *Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd 6647 (1999) (rejecting utility assessment of pole count survey for failure to establish basis for excessive increase).

³⁰ Pub. L. No. 104-104 (1996).

³¹ *Id.*, Sections 224(f), 251(b)(4) (codified at 47 U.S.C. §§ 224(f), 251(b)(4)). Incumbent local exchange carriers (phone companies) also own poles and are subject to the FCC's pole attachment regulations when they lease space to cable operators or telecommunications carriers, but cannot demand access themselves when renting space from other utilities. 47 U.S.C. § 224(a)(5).

competition, and required them to provide non-discriminatory access to poles and other rights-of-way.³² Utility adherence to the rules ensuring fair competition was the “quid pro quo” for allowing the utilities into communications businesses that had been previously forbidden: “Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory.”³³

The Commission also revised the cable formula to arrive at a different pole rental calculation for telecommunications services that attributed the costs related to unusable space on the pole in a different manner than the existing cable formula.³⁴ Curiously, the Commission in this NPRM suggests that the current cable rate formula is a subsidy because it does not factor in unusable space *at all*.³⁵ This is flat-out wrong. The Commission previously explained that the cable rate *includes* the costs of the unusable pole space. Specifically, in 2001 the Commission observed – directly contrary to its statement in the NPRM – that “under the *Cable Formula*, the costs of unusable space are allocated based on the portion of usable space an attachment occupies, the space factor.”³⁶ The Commission further explained that the cable rate includes the costs of the unusable pole space in another order also released in 2001. In rejecting arguments of Alabama Power Company alleging the inadequacy of the cable rate, the FCC stated:

³² Pub. L. No. 104-104, § 103 (amending the Public Utility Holding Company Act, 15 U.S.C. § 79 (1996); 47 U.S.C. § 224(f)).

³³ *Alabama Power*, 311 F. 3d at 1363 (2002). *See also Southern Company v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002) (“Cable companies were fearful that utilities’ prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act.”).

³⁴ NPRM at ¶ 29 and n. 87, citing the 2001 *Order on Reconsideration* at ¶¶ 53, 55.

³⁵ NPRM at ¶ 19 (“We seek comment on the extent to which the current cable rate formula, *whose space factor does not include unusable space*, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers. More importantly, we seek comment on whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service.”)(emphasis added).

³⁶ *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 53 (rel. May 25, 2001).

Respondent [Alabama Power] also claims that the cable rate formula does not require cable attachers to pay their fair share of unusable space and that cable operators must pay the telecommunications rate in order to provide just compensation to the utility. *Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.*³⁷

Thus, the significant difference in the cable and telecom formulas is *how* the unusable space is allocated, not whether it is allocated or not. The unusable parts of the pole that are apportioned solely according to relative use under the cable formula are, under the telecom formula, instead shared among the number of entities attached to the poles and then allocated based on the portion of usable space occupied. This is how the Commission explained it:

In the *Telecom Order*, we adopted a formula for the purpose of allocating costs of unusable space. Under the *Telecom Formula*, pursuant to the specific requirements of the Pole Attachment Act, the costs of unusable space are separated from the costs of usable space and are allocated based on the number of attaching entities. *The costs of usable space are still calculated based on the portion of usable space occupied.*³⁸

Under the telecom formula, the greater the number of entities—and Congress expected many—the lesser amount that each would pay. It was not that the cable formula did not account for unusable space, but that Congress anticipated an explosion of new telecommunications competitors, including electric utilities, CLECs, and others.³⁹

³⁷ *In the Matter of Alabama Cable Telecomm's Ass'n., Comcast Cablevision of Dothan, Inc. v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, ¶ 60 (rel. May 25, 2001) (emphasis added).

³⁸ *Id.* at ¶ 55 (emphasis added).

³⁹ See 47 C.F.R. § 224(e)(2); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 3 (1996) (subsequent history omitted). Congress decided to separately allocate an additional portion (two-thirds) of the unusable pole space equally between all the entities on a pole when calculating rates for telecommunications attachments. See *id.* Accordingly, because the number of attachers is represented in the denominator under the telecommunications formula, the annual pole rental rate for an attacher increases as the overall number of parties on the pole decreases. *In re Amendment of Commission's Rules and*

Of course, a completely different environment existed in 1996. Then, competitive access providers (“CAPS”) were building discrete urban centers, far smaller than cable residential markets, and were attaching separate new lines to utility poles that were dedicated for telephony services for telephony customers. Congress assumed that there would be many such facilities-based telecommunications providers in each market, each placing separate physical network attachments on the poles. Under Congress’s concept, each new attaching entity would decrease the amounts that each entity would pay. Still, Congress also knew that from a standing start in 1996, it would take ten (10) years to achieve reasonable penetration, assuming all went well. Therefore, it prohibited any change in rent for the first five (5) years, and required a phase-in of any changes over the next five (5) years.⁴⁰ That decade, it was assumed, would give CAPs and other facility-based providers the chance to establish substantial market presence without being hit by massive pole penalties from the outset.

The manner and speed with which competitive voice services are being deployed differs markedly from Congress’ expectations when it adopted Section 224(e). First was the collapse of the financial underpinnings to telecommunications expansion and competition.⁴¹ In the telecommunications sector, Congress’s initial vision of numerous competitors in the local exchange quickly vanished. At least 47 CLECs filed for bankruptcy between 2001 and 2003.⁴² Telecommunications companies registered \$1 trillion in corporate debt and close to \$2 trillion in

Policies Governing Pole Attachments; In re Implementation of Section 703(e) of The Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶¶ 55-60 (2001) (“*Recon Order*”).

⁴⁰ See 47 U.S.C. § 224(e)(4) (“The regulations required under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.”).

⁴¹ See, e.g., Simon Romero, *Telecommunications Outlook: First the Bad News, Then the Bad News*, N.Y. Times, June 18, 2002, at C6 (chronicling numerous CLEC bankruptcies and sharply reduced demand from telecommunications equipment vendors).

⁴² See Communications Daily, “Wireline,” Dec. 15, 2003.

market valuation losses⁴³ due to the sharp drop in demand for telecommunications services and CLECs' inability to compete against the entrenched ILECs.⁴⁴ More than 500,000 jobs were lost, industry-wide.⁴⁵ Layoffs throughout the industry became the norm as CLECs were shuttered and even ILECs sought to weather the slumping economy and dramatically reduced demand for advanced services.⁴⁶ ILEC resistance to competition and overly zealous local regulators also conspired to prevent the burgeoning telecommunications industry from reaching its expected potential.

The upshot of all these factors was a dangerous disparity between Congressional expectations and reality especially as to telecommunications pole attachment rates. The CLEC facilities that were expected to proliferate on the pole and the resulting shared pole costs under the 1996 Amendment have not materialized.⁴⁷ In the interim, significant technological changes have occurred that challenge the initial assumptions that competition necessarily would impose additional burdens on facilities.

⁴³ See Letter from Matthew Flanigan, President, Telecommunications Industry Association to Michael Powell, Chairman, FCC, dated Nov. 25, 2002 (describing impact of negative effects of job losses, reduced capital expenditures and decline in investment capital on telecommunications industry).

⁴⁴ Peter J. Howe, *Rivals Question Impact of Financial Penalties on Baby Bells*, Boston Globe, May 20, 2002, at C1 (questioning the billions of dollars assessed against RBOCs for failing to provide adequate local service to rivals and noting its impact on driving competitors into bankruptcy).

⁴⁵ See Letter from Matthew Flanigan, President, Telecommunications Industry Association to Michael Powell, Chairman, FCC, dated Nov. 25, 2002.

⁴⁶ See, e.g., Kris Hudson, *Qwest to Staff: Demand Governs Number of Jobs*, Denver Post, Dec. 16, 2003, at C3 (discussing ongoing layoffs of Qwest employees due to demand and similar layoffs at SBC, Verizon, BellSouth and Sprint); Corey Kilgannon, *Citing an Economic Slump, Verizon Lays Off 2,700 Workers*, N.Y. Times, Dec. 20, 2002, at B10 (reporting Verizon layoffs due to economic slump in telecommunications industry); Telecom, Communications Daily, Nov. 15, 2002 (noting requests for investigation into SBC layoffs in Michigan, Illinois and Texas); *SBC Cites Regulatory Uncertainty, Poor Economy for Earnings Drop*, Communications Daily, Oct. 23, 2001 (discussing SBC's decision to layoff thousands of employees due to income decline from poor economy and regulatory environment).

⁴⁷ Some utilities further intentionally under-report the numbers of entities on their poles to further enhance the penalty. See, e.g., *Texas Cable Partners, L.P. d/b/a Time Warner Cable v. CenterPoint Energy*, File No. EB-04-MD-004 (Complaint filed Mar. 11, 2004). This can lead to very significant additional penalty amounts, and further broadband-to-electric subsidies.

When the 1996 amendments were passed, it was assumed – incorrectly – that there would be many separate attachers and attachments, placing greater demands on the pole. As it has turned out, additional services – whether VoIP or circuit-switched – have not been provided over large numbers of new attachments on each pole, but over existing attachments.

For example, cable operators offering VoIP do so over the same fiber facility that carries video cable services. There is no new line, no new attachment, and no new burden to justify any surcharge. The basic technology assumptions on which the Section 224(e) rate rests are without economic or regulatory basis and obsolete. Neither circuit switched telephony nor VOIP requires dedicated telephone wires lashed to the poles. With a change to IP technology, voice is commingled with video plant.

3. Prior Utility Challenges to the Adequacy of the Cable Rate Have Been Uniformly Rejected.

Cable rates are not “subsidized.” The electric utility industry has been trying for more than two decades to undermine the statutory and regulatory provisions in Section 224 that ensure “just and reasonable” “rates, terms, and conditions” for entities such as cable television operators who must attach their facilities to essential, “bottleneck” utility poles.⁴⁸ Prior to 1996, cable operators facing unreasonable rates, terms, or conditions for attaching their facilities to utility poles filed complaints at the FCC that were resolved pursuant to the provisions in Section 224 and the FCC’s implementing regulations. The utilities’ constitutional challenge to the FCC’s jurisdiction and adequacy of the pole rental formula under Section 224(d) was rejected because there was no “taking” and the pole rental formula was reasonable.⁴⁹

⁴⁸ See *Gulf Power*, 534 U.S. at 330-331; *Florida Power*, 480 U.S. at 247. See also cases cited in note , *supra*.

⁴⁹ *Florida Power*, 480 U.S. at 254.

Subsequent to the enactment of the 1996 Act which, among other things, added a provision in Section 224(f) requiring utility pole owners to grant cable operators and certain telecommunications carriers access to poles, the utilities again challenged the formula and regulations of the FCC as facially unconstitutional for these “new” mandatory attachments. Although a district court found that the mandatory access provisions in Section 224(f) caused a “taking,” it also found that the process for determining pole rental and other payments under the formulas prescribed in Section 224 and FCC regulations (previously upheld in *Florida Power* for “voluntary” attachments) nonetheless satisfied constitutional requirements for paying pole owners “just compensation” for mandatory attachments.⁵⁰ The court of appeals affirmed:

We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the [utilities’] view, constitutionally inadequate under the current Act for forced access situations. Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.⁵¹

A Southern Company affiliate, Alabama Power, picked up the challenge. However, the Bureau rejected Alabama Power’s contention that the cable formula did not provide just compensation, finding instead that Alabama Power was fully compensated for any make-ready or change-out costs associated with the attachments and that the annual pole attachment rate allowed it a full recovery of the costs associated with the space used for the attachment as well as a return on capital.⁵² On review, the Commission affirmed, finding that its pole attachment regulations provided constitutionally sufficient compensation because they enabled Alabama Power “to operate successfully, to maintain its financial integrity, to attract capital, and to

⁵⁰ *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff’d*, 187 F.3d 1324 (11th Cir. 1999) (“*Gulf Power I*”).

⁵¹ *Gulf Power I*, 187 F.3d at 1338.

⁵² *In re Alabama Cable Telecomm’s Ass’n., et al. v. Alabama Power Co.*, 15 FCC Rcd 17346 (2000) (“*Bureau Order*”).

compensate its investors for the risks assumed”⁵³ The Commission also ruled that Alabama Power had not provided credible evidence that the payment of make-ready and annual rents under the cable formula failed to place Alabama Power in the same position monetarily as it would have been but for the cable operators’ attachments. The Commission explained that the “pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspection, pole replacements, and other direct incremental costs of making space available to the cable operator.”⁵⁴ “The Commission’s cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation.”⁵⁵

On further review, the U.S. Court of Appeals for the Eleventh Circuit agreed with the Commission’s application of the established legal principle that just compensation is measured by the loss to the owner and held that, because Commission regulations provide for owners to be paid both their marginal costs through make-ready payments as well as their fully allocated costs through annual pole rents, Alabama Power received more than just compensation.⁵⁶

The constitutional purpose behind an award of just compensation for a taking is to place the property owner “in as good a position pecuniarily” as it would have occupied if its “property

⁵³ *In re Alabama Cable Telecomm’s Ass’n., et al. v. Alabama Power Co.*, 16 FCC Rcd 12209 at ¶ 47 (2001) (“Order”) (citations omitted).

⁵⁴ *Id.* at ¶ 48.

⁵⁵ *Id.* at ¶ 58.

⁵⁶ *Alabama Power*, 311 F. 3d at 1363 (2002). If, and only if, Alabama Power had made a factual showing (which it never attempted) that its poles were “full” and an opportunity to use or rent the space for a more profitable use would Alabama Power have been in a position to demand something more than reimbursement of marginal cost.

had not been taken.”⁵⁷ Even if the mandatory attachment provision of the Pole Attachments Act had not been enacted in 1996, the remainder of the Act by which the FCC regulates voluntary attachments would still be intact. Any claimed “loss” or inadequacy of the cable rate would mean the utility is claiming the right to charge the hold-up value of the pole space, a right to which it would never be entitled under any precedent.⁵⁸ In other words, the utilities often try to characterize the inadequacy of the pole rental not by out of pocket losses, but by the benefit to attachers such as cable operators. That theory, however, has been soundly rejected by every court to consider it. It surely does not justify any policy or change to the existing formula or increase in the pole rental paid to pole owning utilities.

4. Pole Attachment Rates for Commingled Video and Information Services Should Remain at the Level Prescribed by the Cable Rate Formula as Previously Determined by the Commission and Affirmed by the Supreme Court

Pole attachment rates and the Commission’s jurisdiction generally are based on the entity whose system is attached to the pole and not the service that such entity provides; cable television systems providing cable television and information services are subject to the rates under Section 224(d) and non-ILEC telecommunications carriers providing telecommunications and other services are subject to the rates under Section 224(e). The Supreme Court noted this statutory distinction when it held that a cable television system attached to utility poles is still a cable television system even when providing other services. Because the only other rate for

⁵⁷ See, e.g., *United States v. 564 Acres of Land*, 441 U.S. 506, 510 (1979); *FPC v. Natural Gas Pipe Co.*, 315 U.S. 575, 603 (1942) (Black, J.; Douglas, J.; Murphy J., concurring).

⁵⁸ The Supreme Court has held that the Takings Clause does not prevent Congress, through just and reasonable rate regulation, from preventing exploitation of monopoly power. When no fair market exists, as in this case, sellers may not engage in profiteering under cover of the Constitution and extract whatever they can get. *United States v. Cors*, 337 U.S. 325 (1949). “Bottleneck” sellers such as pole owning electric utilities, are not entitled to the “hold-up” value of their property. *United States v. Miller*, 317 U.S. 369, 375 (1943). See also *Loretto v. Group W. Cable*, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (App. Div. 1987) (likely award of one dollar), *appeal denied*, 71 N.Y.2d 802 (Table), *cert. denied*, 488 U.S. 827 (1988).

cable television systems is the rate applicable to telecommunications services, there is no statutory or other basis for imposing some rate *above* the cable rate for broadband services, which this Commission has four times declared to be information services.⁵⁹ While all rates are to be “just and reasonable,” the Commission has already made that determination with respect to information services, including broadband. In finding that cable operators were entitled to the protections of Section 224 when providing commingled cable and broadband Internet services, the Commission expressly found that

We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.⁶⁰

The Supreme Court agreed. Raising pole rents for Internet services would subject innovative cable operators to “monopoly pricing ... [and] defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and, if necessary, ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.’”⁶¹ To the extent the Commission is rejecting the cable rate as the “unitary” rate based on its perception that the cable rate does not include an allocation of the cost of unusable space, its

⁵⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (rel. Mar. 15, 2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, (rel. Sep. 23, 2005); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (rel. Nov. 7, 2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (rel. Mar. 23, 2007).

⁶⁰ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6795-96 ¶ 32 (1998) (footnote omitted). In the omitted footnote the Commission recognized that it had encouraged cable operators to provide Internet services to their customers, citing social contracts with Continental and Time Warner. *Id.* at fn. 125.

⁶¹ *Gulf Power*, 534 U.S. at 339.

proposition and conclusion are clearly erroneous.⁶² Establishing the cable rate as the unitary rate makes economic and regulatory sense, and is consistent with decades of precedent from the courts and the Commission itself.

Moreover, the Commission has concluded that regardless of the classification of broadband services that, consistent with its obligation under Section 224(b)(1), “would apply the subsection (d) [cable] rate as a ‘just and reasonable rate’ for the pro-competitive reasons discussed above.”⁶³ Subsequently the Commission classified cable Internet services as “information” services, recognizing that such a classification would be subject to the earlier ruling that cable operators providing commingled cable video and Internet “information” services would pay the Section 224(d) cable rate on pole attachments. The Commission, when declaring cable modem service to be an information service, ruled:

An attachment not falling within the statutory rate formulas provided in sections 224(d) for attachments by cable service providers or 224(e) for attachments by telecommunications service providers would be subject to just and reasonable rates prescribed by the Commission. *In the Pole Attachment Order, the Commission had determined that the pole attachment rate applicable to attachments by cable television systems using pole attachments to provide both traditional cable services and Internet services should be determined by applying the formula specified in the statute for cable services. That decision is not affected by our categorization of cable modem service.*⁶⁴

The Commission’s ruling on applying the cable rate to pole attachments providing commingled cable video and modem services and the subsequent classification of cable modem

⁶² See text accompanying notes 33-38, *supra*; NPRM at ¶ 22 (“We question TWTC’s assertion that the cable rate should apply to all pole attachments, particularly because, as discussed above, the cable rate does not include an allocation of the cost of unusable space.”).

⁶³ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 at ¶ 34 (1998).

⁶⁴ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 at ¶ 109 (rel. March 15, 2002).

service as an information service were *both* affirmed by the U.S. Supreme Court.⁶⁵ The Supreme Court also accepted the Commission's explanation for maintaining a distinction in the classification of ILEC provided DSL service and cable operator provided cable modem service, noting that the Commission was revisiting that distinction.⁶⁶ That distinction was eliminated and now DSL and cable broadband are classified both as information services.⁶⁷

The remaining distinction is only that cable operator provided commingled service goes at the cable rate while telecom carrier commingled service goes at the telecom rate. However, we do not oppose CLECs that face the same attachment terms as cable operators paying the same cable rate for their attachments because there is no legitimate reason to increase *any* broadband pole attachment rates. Applying the cable rate to ILECs is more complicated; ILECs generally have pole attachment rights and benefits that are far superior to cable in their agreements with electric utilities. ILECs are for the most part exempt from paying make-ready, have up to 3 feet of space on a pole allowing for multiple attachments, have superior notice, change-out, and relocation rights, and often pay no rent for any attachment, but a fee that is triggered when the ILEC's pole ownership varies from a defined percentage.⁶⁸ In theory, though, we agree that where ILECs are similarly situated (i.e., where they do not own poles and are responsible for all

⁶⁵ *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688 (2005) ("*Brand X*"); *see also Gulf Power*, 534 U.S. at 342.

⁶⁶ *Brand X*, 125 S.Ct. at 2711 ("Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service and when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities.").

⁶⁷ *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (rel. Sep. 23, 2005).

⁶⁸ *See generally* Report of Patricia D. Kravtin, attached to Comments of Comcast Corporation.

make-ready costs associated with attaching to electric company poles), there is no reason for them to be required to pay in excess of the rate produced under the cable rate formula.⁶⁹

5. The State Public Service Commissions in states certified to regulate pole attachments have uniformly rejected application of the telecom pole rent penalty

States are allowed to adopt their own regulatory pole attachment regimes by “certifying” to the FCC that they regulate “the rates, terms and conditions for poles attachments” and have “issued and made effective rules and regulations implementing the state’s regulatory authority over pole attachments,” that specifically “consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services.”⁷⁰ In furthering that objective, the State PSCs that have considered it have rejected the application of the telecommunications pole rent for broadband services.⁷¹ The salient fact for rejecting a penalty based on the provision of new services is that it would operate simply as a tax on the internet and IP based services, such as VoIP, when the provision of these services over existing or even new facilities, place no added burden on the pole.⁷² Every certified state that has

⁶⁹ *Id.* We also note that “parity” with the ILECs has already been rejected by the Commission’s facilitating ILEC entry into the video business with streamlined and less costly obligations than incumbent cable operators. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 26 (rel. Mar. 5, 2007) (“requiring [ILEC] entry on the same terms as incumbent cable operators may thwart entry entirely or may threaten new entrants’ chances of success once in the market.”).

⁷⁰ 47 U.S.C. § 224(c); 47 C.F.R. § 1.1414(a)(1)-(3).

⁷¹ Prior to the 1996 Act, one state PSC did deviate from the cable formula. The NPRM inquires whether the approach of the Maine PSC should be considered in establishing broadband pole rental rates. NPRM at ¶ 32. However, Maine uses “stand-alone costs” that are similar to replacement or avoided cost approaches proposed by utilities in other proceedings that have been rejected by the Commission twice previously. *In the Matter of Commission’s Rules and Policies Governing Pole Attachments*, Partial Order on Reconsideration, 16 FCC Red. 12103 at ¶¶ 15, 17 (2001) (rejected pole attachment rates based on replacement cost), affirming *Fee Order*, 15 FCC Red 6453, at ¶ 10 (2000) (replacement cost methodology rejected).

⁷² In a recent proceeding before the Connecticut Department of Public Utility Control (“DPUC”), a utility expert witness on pole attachments acknowledged that attachments used to provide commingled cable and telecom put no extra burden on a pole and result in no greater cost. The Connecticut DPUC noted “[United Illuminating’s] expert witness Kowalski testified that there is no additional cost burden.” The DPUC went on to quote from the hearing transcript: “Q (McDermott): What about Mr. Glist’s argument that offering telecommunications services through the

examined whether to adopt the FCC telecom formula has rejected it in favor of the cable formula. For example, in 1998 the California Public Utilities Commission (“CPUC”) conducted a detailed investigation and expressly extended the cable rate provided by the California statute to telecommunications attachments.⁷³ A report prepared in 2001 for the National Association of Regulatory Utility Commissions (“NARUC”) recommended that “States use the California statute as a model for determining pole attachment rates. . . .”⁷⁴ Thereafter, in 2002, both the New York Public Service Commission and the Regulatory Commission of Alaska made the same choice – deciding to continue the use of the cable rate for all attachers regardless of what services were being provided.⁷⁵ In adopting the FCC’s cable formula, the Alaska Commission made the cogent point that “the CATV formula . . . provides the right balance given the significant power and control of the pole owner over its facilities;” and “that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers.”⁷⁶ Finally, even states not reaching the question of “commingled services” have

same cable on the pole creates no additional burden on the cable or the pole, do you agree with that? A (Kowalski): Yes, I do... it’s not a question of a burden on the pole...”. *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments By Cable Systems Providing Telecommunications Services and Internet Access*, Docket No 05-06-01, 2005 Conn. PUC LEXIS 295, at *11-12 (Dec. 14, 2005).

⁷³ *CPUC Rulemaking* at 84-88 (finding “no convincing rationale justifying the adoption of different pole attachment rates” and further stating that “[t]he use of the existing cable pole attachment rates for all CLCs will also avoid the need for further protracted proceedings to prepare costs studies and to adjudicate default rates. . . .”); Cal. Pub. Util. Code § 767.5(c)(2) (provides the annual recurring cable rate for pole attachments which the CPUC applied to all attachments regardless of services offered).

⁷⁴ “Pole Attachments” by “Ad Hoc Group of the 706 Federal/State Joint Conference on Advanced Services,” National Association of Regulatory Utility Commissioners, at 20 (July 2001).

⁷⁵ See *NY Pole Rate Proceeding; In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted under 3 AAC 52.900 – 2 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 14 (Oct. 2, 2002).

⁷⁶ *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted under 3 AAC 52.900 – 2 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 14, at *4 (Oct. 2, 2002).

routinely followed the FCC formula in determining the cable rate in their jurisdictions where applicable.⁷⁷

Specifically, certified states that have expressly rejected adoption of the FCC telecom formula have done so as follows:

Oregon

Idaho Power and others supporting its proposal, as well as Staff, urge the Commission to consider the telecommunications formula. These participants argue that the telecommunications rate formula better considers the impact of several occupants on a pole. However, the cable formula has been found to fairly compensate pole owners for use of space on the pole. In addition, use of the cable rate will allow parties to rely on the case law interpreting the rate, providing guidance in forming their contracts. Based on the legislative history, as well as consideration of the many arguments made by the participants, we conclude that we will follow the cable rate formula and the subsequent FCC and court decisions interpreting it.⁷⁸

⁷⁷ See generally N.J.A.C. 14:18-2.9 *et seq* (provides rates for “cable television or similar third party attachments” based on utilities’ embedded costs); *A Complaint and Request for Hearing of Cablevision of Boston Co., Pursuant to G.L. Chapter 166 § 25A and 220 C.M.R. § 45.04 of the Department’s Procedural Rules Seeking Relief from Alleged Unlawful and Unreasonable Pole Attachment Fees, Terms and Conditions Imposed on Complainants by Boston Edison Co.*, D.P.U./D.T.E. 97-82, p. 18 (Apr. 15, 1998) (“... the federal approach to pole attachment rates . . . adequately assures that BECo recovers any additional costs caused by the attachment of . . . cables to BECo’s poles, while assuring that the [cable operators] are required to pay no more than the fully allocated costs for the pole space occupied by them.”); *Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In the District of Columbia*, Case No. 815-T-52, Order No. 12796, at 3 (July 25, 2003) (the DC Public Service Commission looks to FCC regulations in reaching a finding that a negotiated pole attachment agreement is in the public interest).

⁷⁸ *Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety*, AR 506; 510, 2007 Ore. PUC LEXIS 115, at *24 (2007) (adopting FCC cable rate formula and finding that “the cable formula has been found to fairly compensate pole owners for use of space on the pole.”).

California

In 1998 the California Public Utilities Commission (“CPUC”) conducted a detailed investigation and expressly extended the cable rate provided by the California statute to telecommunications attachments.⁷⁹

We acknowledge that the FCC has prescribed a phased-in rate differential for cable operators’ pole attachments based on whether or not they also offer telecommunications services in its implementation of the provision of the [1996 Telecommunications] Act. . . . Notwithstanding these federal actions, we are not bound by these FCC rules. Moreover, we find no convincing rationale justifying the adoption of different pole attachment rates for cable operators depending on whether or not they offer telecommunications services. . . . We conclude that the adoption of attachment rates based on the [cable rate] formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be lawfully deprived of any property rights. [The formula] provides that the pole attachment rates will be based on the utilities’ annual cost of ownership, including historic depreciated capital costs and annual operating expenses. Thus, the rate corresponds to the costs incurred by the utility to provide the attachment. Under the statutory pole attachment formula, the utility is allowed a rate equal to 7.4% of its annual cost of ownership. The 7.4% factor represents [the] portion of the total pole space used to support the one foot for communications space, as typically used by an attachment party. Since the 7.4% allocation applies to the cost of the entire pole, it results in a fair cost apportionment in deriving attachment rates, either for cable or telecommunications services. The use of the . . . formula constrains the default amount that may be charged for pole and conduit attachments, and to that extent, promotes the emergence of a competitive local exchange market. While the revenues that the utility realizes from pole attachments under the . . . formula may be less than the amount that could be extracted purely through negotiations, there is no reason to conclude that the reduced revenues constitute an unlawful taking of property. The [formula] has never been found to be confiscatory with respect to pole attachments for cable operators. As previously found by the courts, ‘[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for risk

⁷⁹ *CPUC Rulemaking* at 84-88 (finding “no convincing rationale justifying the adoption of different pole attachment rates” and further stating that “[t]he use of the existing cable pole attachment rates for all CLCs will also avoid the need for further protracted proceedings to prepare costs studies and to adjudicate default rates. . . .”); Cal. Pub. Util. Code § 767.5(c)(2) (provides the annual recurring cable rate for pole attachments which the CPUC applied to all attachments regardless of services offered).

assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called “fair value” rate base.”⁸⁰

Alaska

The CATV formula is reasonable and should be the default formula for calculating pole attachment rates if the pole owner and the attachers cannot negotiate their own agreement. We find that the formula provides the right balance given the significant power and control of the pole owner over its facilities. We are also concerned that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers during a transition period before the pole owning utility reduces its rates to compensate for the increased pole revenues. Applying the CATV formula also comes with the benefit that a single formula (based on use) can be applied to the entire pole. We believe it is fair to assign the unusable portion of the pole based on how the usable portion of the pole is assigned. We are not convinced from the record that alternative formulas before us are any more accurate and reasonable than the existing CATV formula.⁸¹

Connecticut

Regarding the cost and cable subsidization issue, [the utility] has put forth the proposition that it seeks to apply the telecommunications cost-based formula to alleviate the burden on its ratepayers by obtaining a fair and reasonable rate for attachments providing additional services is far from clear as to whether the price differential between the cable and telecommunication attachment fee is due to any real reflection of increased cost to [the utility] and its ratepayers. Notwithstanding the testimony of [the utility’s] witness and [the utility’s] many references to its need to alleviate the cost burden on its ratepayers . . . [the utility’s] expert witness testified that there is no additional cost burden. Rather, the proposed new telecommunications attachment fee is merely a formula application or scheme. Although it is not a necessary finding for the instant declaratory ruling, the Department is not persuaded that there are incremental real costs to [the utility] from a pure cable company wire that provides only cable services and a cable company wire that also provides internet and telecommunication services. Therefore, there do not appear to be any real cost impacts to [the utility] as a result of . . . ruling” that the cable rate applies.⁸²

⁸⁰ *Order Instituting Rulemaking on the Commission’s Own Motion Into Competition of Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, at 53-56 (Oct. 22, 1998) (internal citations omitted).

⁸¹ *In Re: Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Alas. PUC Oct. 2, 2002).

⁸² *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability Of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services And Internet Access*, Docket No. 05-06-01, 2005 Conn. PUC LEXIS 295, at *11-12 (2005).

Other certified states that switched from their home grown formula to the FCC Cable Rate Formula without specific discussion of the telecommunications rate include:

New York

After studying extensive expert testimony suggesting alternative formulas, the NYPSC adopted the FCC Cable Formula, explaining that application of the formula along with federal access standards would promote competition and assist telecommunications providers in deploying telecommunications facilities seamlessly across state lines. In reaching its decision, the NYPSC recognized that:

Since the enactment of the Telecommunications Act of 1996, there has emerged a clear need for cooperative federalism in this and other areas of telecommunications so as to provide consumers the full benefits available from the development of competitive markets. In adopting the federal [cable] formula, the NYPSC sought “to make it easier for service providers to do business by eliminating unnecessary variation in regulatory requirements” and to “make it possible for firms operating nationally to compare favorably New York’s practices and those followed elsewhere.”⁸³

Michigan

For similar reasons, the Michigan Public Service Commission (“MPSC”) also adopted the FCC Cable Formula in 1997, following years of using its own rate standard. Faced with utility applications for steep pole rental increases, the MPSC concluded that the FCC Cable Formula was the most desirable and aligned pole rates in Michigan “more closely with other states that already adhere to this standard.”⁸⁴

⁸³ Case 95-C-0341, *In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095*, Opinion and Order Setting Pole Attachment Rates (issued June 17, 1997).

⁸⁴ *Consumers Power Co. v. Mich. Pub. Serv.* Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis 26 (Feb. 11, 1997), *reh’g denied*, 1997 Mich. PSC Lexis 119 (April 24, 1997), *aff’d Detroit Edison Co. v. Mich. Pub. Serv. Comm’n*, No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff’d Consumers Energy Co. v. Mich. Pub. Serv. Comm’n*, No. 113689 (Mich. Sup. Ct. Aug. 31, 1999).

Massachusetts

A year later, in April, 1998, the Massachusetts Department of Telecommunications and Energy (“DTE”) decided to model its approach on the FCC Cable Formula because that approach “meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them.” The DTE also believed that adopting the FCC Cable Formula “promote[s] the goal of resolving pole attachment complaints by a simple and expeditious procedure based on public records so that all of the parties can calculate pole attachment rates as prescribed by the [DTE] without the need for our intervention.”⁸⁵

Vermont

In 2001, the Vermont Public Service Board issued new rules, essentially adopting the FCC formula for cable attachments, but with a more favorable presumption concerning usable space to reflect the taller plant typically in use today.⁸⁶ The Board believed that the reduction in pole attachment costs to cable companies, resulting from application of the formula, would “lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers.”⁸⁷

⁸⁵ A Complaint and Request for Hearing of Cablevision of Boston Co., et al, pursuant to G.L. Chapter 166 § 25A and 220 C.M.R. § 45.04 of the Department’s Procedural Rules seeking relief from alleged unlawful and unreasonable pole attachment fees, terms and conditions imposed on Complainants by Boston Edison Co., D.P.U./D.T.E. 97-82, at 18-19 (Apr. 15, 1998).

⁸⁶ VT. PUB. SER. BD. R. § 3.706(D)(2)(c).

⁸⁷ Policy Paper and Comment Summary on PSB Rule 3.700, Vermont Public Service Board, at 6 (2001).

Utah

In 2006, the Utah Public Utility Commission adopted the FCC Cable Rate formula wholesale following a comprehensive pole attachment rulemaking.⁸⁸

In sum, not one certified state has adopted the FCC Telecommunications Formula. Keeping costs reasonable is particularly important in rural states where population densities can be sparse and many poles are need to serve a comparatively few customers.⁸⁹ Even a relatively modest fluctuation in pole pricing can have a dramatic, negative effect on whether or not some rural citizens will be able to receive the benefits of advanced broadband services.

B. The Pending Rulemaking Petitions Do Not Raise Any Issue Concerning the Adequacy of Pole Attachment Rental Rates

Separate petitions by Fibertech Networks, LLC (“Fibertech”) and the United States Telecom Association (“USTA”) were the genesis of the captioned proceeding. In the first petition, Fibertech, a competitive local exchange carrier, requested the Commission to adopt certain standard practices for pole attachments and address those practices being employed by pole owning utilities that were causing unnecessary delays and unreasonable costs for new, competitive telecommunications entrants.⁹⁰ In the second, USTA, an association representing incumbent local exchange carriers, petitioned the Commission to afford ILECs protection from unreasonable pole attachment rates, terms and conditions imposed by electric utilities, specifically asking the FCC to change its rules and expressly *include* ILECs and their attachments within Section 224’s rate, terms and conditions protections on statutory and policy

⁸⁸ UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006).

⁸⁹ Vermont found that keeping pole attachment rates low would “lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers.” Policy Paper and Comment Summary on PSB Rule 3.700, at 6, available at <http://www.state.vt.us/psb/rules/proposed/3700/PolicyComments3700.pdf>.

⁹⁰ *In re Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303 (filed Dec. 3, 2005).

grounds.⁹¹ Neither petition sought any change to pole attachment rates for cable operators, or any revision to the existing rate formulae, or even suggested that existing cable pole attachment rates were inadequate or subsidized in any way.

Subsequently, Time Warner Telecom, in a “white paper” filed in both the Fibertech and USTA dockets, sought a reduction in the telecommunications pole attachment rate it pays as a telecommunications carrier providing telecommunications services.⁹² Nothing in the white paper sought or requested a proceeding to consider raising rates applicable to cable television or broadband information services. Nonetheless, the Commission has tentatively concluded that all attachments for broadband access should be a “single rate regardless of platform” that is *greater* than the existing cable rate,⁹³ finding that TWT’s request to *lower* telecom attachment rates as “necessarily suggest[ing] that [the Commission] should adjust the cable rate ‘up’ to resemble the telecom rate.”⁹⁴ Furthering this error, the Commission questions whether cable operators “should continue to receive *such subsidized pole attachment rate* at the expense of electric consumers.”⁹⁵ As we explained earlier, nothing suggests the cable rate is subsidized and the only basis cited in the NPRM contradicts a long line of Commission precedent.⁹⁶

⁹¹ *In re Petition for Rulemaking of the United States Telecom Association*, RM-11293 (filed Oct. 11, 2005).

⁹² See Time Warner Telecom Presentation Regarding Pole Attachment NPRM, attached to Letter from Thomas Jones, Counsel to Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-11303, 11293 (filed Oct. 23, 2007).

⁹³ NPRM at ¶ 3.

⁹⁴ NPRM at ¶ 31.

⁹⁵ NPRM at ¶ 19 (emphasis supplied). While the Commission purports to justify a single rate to “create even-handed treatment and incentives for broadband deployment,” there is nothing to support its conclusion that the “rate should be *higher* than the current cable rate...”. *Id.* at ¶ 36 (emphasis supplied).

⁹⁶ See text accompanying notes 33-38, *supra*. In addition, the Commission added that it wishes to consider whether a single rate would be “equitable and competitively neutral.” Although courts and this Commission have upheld the cable rate under 224(d) being “just and reasonable,” the Commission inexplicably rejects the notion that the cable rate should be the single rate, NPRM at ¶ 27, although the Commission has already concluded in prior proceedings that the cable rate *should* be the rate for commingled cable and broadband services. See text accompanying notes 58-61, *supra*.

Courts have routinely held that any agency decision must have a reasoned basis.⁹⁷ Moreover, while “an agency normally possesses a generous measure of discretion respecting the launching of a rulemaking proceeding . . . its exercise is reviewable if plainly misguided.”⁹⁸ Without any basis apparent from the two petitions, or any request or inference in any filing that pole rental paid by cable operators providing broadband or information services are inadequate, the tentative conclusion that cable operators’ pole rental rates should *increase* is itself arbitrary and capricious.

Every decision considering the adequacy and constitutionality of the pole rental rates established under Section 224(d) for cable operators found that the rates more than adequately compensated utility pole owners for all the costs they incur to host third-party attachments, plus a reasonable profit, under any theory of compensation – except perhaps for that which based on monopoly or anticompetitive pricing. “The Commission’s general rulemaking power is expressly confined to promulgation of regulations that serve the public interest; it ‘must place the public interest above private interests in carrying out its duties.’ And, as the Second Circuit has so well put it, ‘(t)he Commission may reach compromises, . . . but it may not simply compromise between the interests of different [] groups and gloss over the more fundamental public interest.’”⁹⁹ Here, the Commission appears to be placing the interest of pole owning electric utilities and their zeal to collect monopoly pole rental above that of cable subscribers and the competitive marketplace. The Commission has itself said: “Nothing in the record demonstrates

⁹⁷ See, e.g., *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1219 (D.C. Cir. 1999) (“The FCC must supply a reasoned basis for its decision.”) (internal citations omitted).

⁹⁸ *Geller v. F.C.C.*, 610 F.2d 973, 979 (D.C. Cir. 1979) (footnotes and citations omitted).

⁹⁹ *Id.* at 980.

that the utilities' monopoly over poles has since changed.”¹⁰⁰ Indeed, when confronted with this precise situation after the 1996 Act, the Commission expressly rejected applying the higher pole attachment rates to broadband service attachments in favor of the cable rate.¹⁰¹ While the Commission may revisit its prior policies and precedent, it is axiomatic that an agency cannot do so without providing “a persuasively reasoned explanation for modifying its earlier position that is itself rationally grounded in the evidence before the agency.”¹⁰²

¹⁰⁰ *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 13 (rel. May 25, 2001).

¹⁰¹ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6795-96 ¶ 32 (1998).

¹⁰² *See, e.g., Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1358 (D.C. Cir. 1988).

IV. CONCLUSION

Raising pole rents will achieve no significant public policy objective. It will not accelerate broadband deployment, increase data speeds, or provide affordable Internet access for more Americans. Instead, raising pole rents will do nothing more than impose a new and massive “broadband tax” on Internet services and put additional cost pressure on cable operators, raise subscriber rates, and provide a windfall for the pole owning utilities.

Respectfully submitted,

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